

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

RYAN H.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE  
COUNTY,

Service Agency.

OAH No. 2005120353

**DECISION**

Administrative Law Judge Gary Brozio, State of California, Office of Administrative Hearings, heard this matter in Santa Ana, California, on May 10, 2006.

Mary Kavli, Program Manager, Fair Hearings & Mediations, represented the Regional Center of Orange County.

Lin H., Ph.D., Claimant's father, represented Ryan H., who was not present at the fair hearing.

The matter was submitted on May 10, 2006.

**ISSUE**

Does Ryan's diagnosis of autism and Pervasive Developmental Disorder constitute a "substantial disability" under the Lanterman Act?

**FACTUAL FINDINGS**

*Background*

1. Ryan was born October 28, 2002. He lives with his mother, father, and a younger sister. Ryan was diagnosed with autism and Pervasive Developmental Disorder. He attended Montessori preschool. He received early intervention services at home and at school through the Regional Center of Orange County (RCOC), including applied behavioral analysis, speech therapy, and occupational therapy.

2. When Ryan was about to turn three, RCOC reevaluated his case for continued services. RCOC reviewed Ryan's school records, medical records, medical diagnoses, and psychological evaluations. In addition, Ryan's service coordinator observed him at a school district assessment. Based on this information, RCOC determined that Ryan was ineligible for continued regional center services under the Lanterman Act because he was not substantially disabled.

3. On October 28, 2005, RCOC wrote Ryan's parents a letter explaining that his Early Start services would end when he turned three. Ryan's parents disputed RCOC's determination, but declined RCOC's invitation to reevaluate Ryan. On January 10, 2006, an informal meeting between the parties failed to resolve the dispute. This hearing followed.

4. At the hearing, Ryan's father argued that Ryan's condition constituted a substantial disability under the Lanterman Act. No expert testimony was offered to support the argument. The argument relied solely upon medical reports and the father's lay opinion.

#### *Dr. Brody's Reports*

5. On July 21, 2005, Dr. Leslie Brody, a pediatric neurologist, evaluated Ryan and determined that there were "*insufficient criteria for a diagnosis of full blown autism.*" The doctor produced a two-page report, which noted that Ryan had speech and language delay. The report also indicated that Ryan had difficulty with eye contact, peer relationships, and social and emotional reciprocity. The report indicated that Ryan scored 26 on the Childhood Autism Rating Scale (CARS). The report concluded that Ryan might fit in the category "*PDD/autism/NOS, which is to say that he has many autistic features, without having a complete diagnosis.*" The report stated that Dr. Brody made his initial determination using the DSM-IV criteria.

6. On July 25, 2005, Dr. Brody issued another short report stating that Ryan required occupational therapy, physical therapy, speech therapy, and applied behavioral analysis (ABA).

7. On October 28, 2005, Dr. Brody changed Ryan's diagnosis to "PDD/Autism/Active." This was done in a single paragraph. The report stated that Ryan had difficulty with eye contact, peer relationships, and social empathy, delayed speech, poor imaginative play, difficulty with transitional behavior and behavior confirming the impression." The report noted that there were no changes in Ryan's neurological examination from the last visit. The report did not explain how the doctor reached a different diagnosis. In addition, the report noted that Ryan's speech was emerging with better receptivity. The report recommended speech therapy and ABA.

8. On February 24, 2006, Dr. Brody prepared a follow-up report. The quarter-page report stated that there was no neurological change from previous exam. The report was requested by the parents to "delineate criteria on which Ryan's diagnosis [was] based."

The report stated that Ryan had difficulty with eye contact, that he had difficulty with peer relationships and social and emotional empathy. He had delayed speech, poor imaginative play, and difficulty with transitional behavior. Dr. Brody wrote that these constituted six of the 12 criteria for autism. The report reiterated the diagnosis of “PDD/Autism/Active.” The report stated that Ryan had “*substantial disabilities in the areas of communication skills, learning and capacity for independent living.*” The doctor wrote, “There is no question in my mind that he should be a Regional Center Client with services for a child with PDD/Autism? Active.” The father testified that Dr. Brody did not reevaluate Ryan on this visit – the doctor merely observed Ryan while he conversed with the parents.

#### *Dr. Lott’s Reports*

9. Dr. Ira Lott, an apparent specialist in pediatrics and neurology, evaluated Ryan on January 31, 2006. He wrote a one-and one-half page report. The report stated that Ryan had “an autistic disorder manifested by language regression, poor eye contact, preservation of sameness, difficulty with transitions, parallel play, self-stimulatory behaviors, and some echolalia.” The report noted, however, that Ryan had begun to speak, his eye contact was improved, and that he did not engage in hand flapping or toe walking. The report concluded that Ryan “needs to continue in an intensive preschool program for children with autistic disorder where the emphasis is on pragmatic language development and social skills training.”

10. On March 1, 2006, Dr. Lott wrote a prescription for Ryan stating, “Child has medical dx of autism (see note of 1-31-06) Parents need respite services.”

#### *Dr. Dowling’s Opinion and Testimony*

11. Dr. Arleen Dowling, a pediatrician employed by RCOC, testified that she has worked at RCOC since 1986. Her major responsibility was making eligibility determinations, and she was indisputably an expert in evaluating whether a “turning-three child” has a “substantial disability” under the Lanterman Act. She was credible.

12. Dr. Dowling explained that the eligibility decision was a team decision. In determining whether a child had a substantial disability, the team considered whether the child had “significant functional limitations” in at least three of the following areas: (1) self-care, (2) receptive and expressive language, (3) learning, (4) mobility, and (5) self-direction. The team did not consider capacity for independent living or economic self-sufficiency because these criteria were not appropriate for three-year-olds. When evaluating autistic children, the team considered whether the disability was expected to continue indefinitely because symptoms of autism resolve in some children as they mature. The team determined whether or not medical conditions were causing some of the symptoms. Finally, the team made the diagnosis of autism using the DSM-IV criteria.

13. Based on her review of the file in January and March 2006, Dr. Dowling determined that Ryan was not eligible for services under the Lanterman Act. As Dr.

Dowling put it, the question was not whether Ryan had autism; the question was whether his condition constituted a “substantial disability.” Even if Ryan was autistic, not every autistic child met the “substantial disability” criteria of the Lanterman Act. Further, it was RCOC’s sole responsibility to make an assessment of eligibility under the Lanterman Act. The reports from Dr. Brody and Dr. Lott were vague and imprecise; they did answer the question of whether Ryan had a substantial disability; and they failed to address the question whether Ryan’s disability was life long. Finally, RCOC offered Ryan’s parents the opportunity for a reassessment and the parents refused, which deprived RCOC of making a clinical assessment.<sup>1</sup>

### *The Psychologists*

14. Dr. Chris Davidson, an educational psychologist, did not testify. The doctor conducted an extensive evaluation of Ryan on October 6, 2005, performed numerous standardized psychological tests, reviewed extensive records, and produced an exhaustive 81-page report. The parents secured Dr. Davidson’s report.

15. The RCOC’s psychologist, Mary Parpel, testified at the hearing. Dr. Parpel specializes in autism and conducts as many as 200 eligibility reviews per month, usually in borderline cases. Dr. Parpel initially reviewed Ryan’s file on October 6, 2005, but found it necessary to obtain further records from the school district. On October 27, 2006, Dr. Parpel performed another review which included Dr. Brody’s reports from July 2005, Ryan’s school records, and Dr. Davidson’s 81-page report.

16. Dr. Parpel testified that Dr. Davidson was a thorough evaluator and a well-respected diagnostician. Dr. Parpel relied heavily on Dr. Davidson’s report in forming her opinions.

17. Dr. Parpel concluded that Ryan did not have receptive language impairment. He was bright, had good learning capacity, and had a high I.Q. He was significantly impaired in expressive language, but his prospects were good once he acquired the ability to speak. Ryan had absolutely no mobility impairment, and his self-care was within normal limits. Concerning self-direction, Dr. Parpel concluded that Dr. Davidson’s report did not support a finding of deficiency in this area. Ryan successfully attended Montosorri school, and had no significant behavioral problems.

18. Ryan’s only substantial disability was in expressive language. He had no major behavioral issues, no major self-stimulation behaviors, no control issues, no tantrums, and he was not running away. He was easily redirected. In addition, Dr. Davidson determined that Ryan scored 31 on the CARS scale, in the lower half of the 30 to 37 range, which is classified as “Mildly-Moderately Autistic.” This was the highest score Ryan

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<sup>1</sup> An assessment would involve a review of all medical, school, and therapy records. It would consider family input, opinions, and observations. Staff would observe Ryan in the office and see how he played and interacted with others, and might even observe Ryan at school.

received on the CARS scale, and it was not sufficient to show a substantial disability due to autism. Dr. Parpel testified that RCOC becomes concerned when the CARS scale approaches 35.

19. Dr. Parpel did not believe it was necessary to reassess Ryan's condition. As the doctor testified, Ryan was doing "really, really well" compared to other autistic children. He was intelligent, which was the best predictor of future success, and his level of intelligence likely meant that he could eventually direct his own life.

#### *The Father*

20. Ryan's father explained that, early on, he and his wife were in denial about Ryan's condition. Consequently, they were inexperienced in recognizing the signs and symptoms of autism. The father believed that Dr. Brody's initial diagnosis was incorrect because he and his wife did not accurately describe Ryan's condition.

21. The father testified that he was now more educated in recognizing the symptoms of autism. He described Ryan's condition at length. Ryan has no friends and does not initiate play. He does not talk to others and keeps to himself. He observes other children but does not participate in play. Ryan has learning difficulties. He can say "yes" and "no" but does not understand the meaning of the words. He does not bond emotionally. He resists change and has difficulty with transitions. He refuses to put on new clothes, crawls into his closet and sits in a basket, turns lights on and off, pulls his eyebrows, lines up objects, and pushes hard objects into his tummy. He has trouble sleeping alone and often sleeps with his father.

22. The father believed that Doctors Brody and Lott correctly diagnosed Ryan with autism. The father admitted that Doctors Lott and Brody did not test Ryan, nor did they review his school records. Nevertheless, the father believed that the diagnoses of those doctors, in combination with Dr. Davidson's report and Ryan's school records, demonstrated that Ryan had a substantial disability. In the father's opinion, Ryan was "not severely autistic" but he did have a "substantial disability."

23. The father did not trust the staff at RCOC and was not confident in their ability to evaluate Ryan accurately. He did not consent to Ryan being reevaluated at RCOC. He offered to have a neutral third party evaluate the seriousness of Ryan's condition.

### LEGAL CONCLUSIONS

#### *The Lanterman Act*

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with *developmental disabilities*, regardless of age or degree of

handicap, and at each stage of life.” (§ 4501; Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 388 (emphasis added).) *Developmental Disability*

2. Section 4512, subdivision (a) of the Act defines a developmental disability as follows:

“(a) ‘Developmental disability’ means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.” (Emphasis added.)

3. Section 54000 of Title 17 of the California Code of Regulations further defines the term developmental disability:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and

actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

### *Substantial Disability*

4. Section 4512, subdivision (l) of the Act defines a substantial disability as follows:

“(l) ‘Substantial disability’ means the existence of *significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:*

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

5. Section 54001 of Title 17 of the California Code of Regulations further defines the term substantial disability:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

6. Section 54002 of Title 17 of the California Code of Regulations states that “‘Cognitive’ as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

#### *Burden of Proof*

7. In a proceeding to determine eligibility, the burden of proof is on the Claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)



*The Evidence Was Not Sufficient to Establish That Ryan is Eligible for Regional Center Services*

8. There was no credible evidence that Ryan's condition constituted a substantial disability under the Lanterman Act. The only medical diagnosis finding that Ryan had a substantial disability was Dr. Brody's report from February 24, 2006. The report stated that Ryan had "*substantial disabilities in the areas of communication skills, learning and capacity for independent living.*" The doctor wrote, "There is no question in my mind that he should be a Regional Center Client with services for a child with PDD/Autism? Active." This report was conclusory. It lacked analysis and gave no basis for the opinion. There was no indication what records the doctor reviewed, and there was no indication what tests the doctor performed. The doctor did not testify and the doctor's opinion was not subjected to cross-examination. By itself, the report was not credible evidence.

Further, the diagnosis contradicted Dr. Brody's diagnosis in the report of July 2005. That earlier report indicated that there were "*insufficient criteria for a diagnosis of full blown autism.*" The report concluded that Ryan might fit in the category "*PDD/autism/NOS, which is to say that he has many autistic features, without having a complete diagnosis.*" What caused Dr. Brody to change the diagnosis remains a mystery.

Finally, the report concluded that Ryan had a substantial disability in the area of "capacity for independent living." The experts at RCOC explained that they did not consider this category in three-year-old children because no three-year-old child has the capacity for independent living. The category cannot be considered because the regional center has determined that it is not "appropriate" to "the age of the person." (§ 4512, subd. (l).) Dr. Brody's report provided no reason to reject RCOC's determination in this regard. Thus, even if believed, Dr. Brody's report is legally insufficient to demonstrate a substantial disability because it found a substantial disability in only two qualifying categories. (§ 4512, subd. (l).)

9. The remaining evidence was even less persuasive. Dr. Lott's initial report said nothing about whether Ryan's condition constituted a substantial disability, and the prescription from March 1, 2006, did nothing to clarify the issue. And although Claimant's father has a doctorate degree, it was not in psychology or any related field. His lay opinion regarding whether Ryan had a "substantial disability" was not entitled to as much weight as those who specialized in developmental disabilities. In short, Claimant's evidence did not meet the burden of proof.

10. It bears mention that this case involves more than a mere failure of meet the burden of proof. Two qualified experts from RCOC testified that Ryan did not have a substantial disability under the Lanterman Act. One of those experts, Dr. Parpel, testified that Ryan was doing "really, really well" compared to other autistic children. Ryan was intelligent, which was the best predictor of future success, and his level of intelligence likely meant that he could eventually direct his own life. Dr. Parpel relied heavily on Dr. Davidson's psychological analysis, and Dr. Davidson was Claimant's own psychologist. This meant that the individual who performed the most complete and reliable testing (Dr.

Davidson), and the individuals who performed the most complete review of the relevant records (Dr. Dowling and Dr. Parpel), determined that Ryan was not substantially disabled under the Lanterman Act. Moreover, the parents rejected RCOC's offer of reassessment, which deprived those doctors of making a clinical diagnosis.

11. On this record, it cannot be concluded that Ryan has a substantially disability which entitles him to services under the Lanterman Act. This conclusion is based on all the factual and legal findings.

#### ORDER

The RCOC's termination of services is upheld.

DATED: May 23, 2006

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GARY BROZIO  
Administrative Law Judge  
Office of Administrative Hearings